No. 706

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

W. HOWES MEADE,
Petitioner,

v.

C. EDWARD GOLDBERG, etc.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In an action against co-defendants for delinquent installments upon a debt, wherein it is determined that a defendant is the principal obligor and primarily liable for the repayment of a loan, is that defendant entitled to relief from the judgment under Rule 60 (b) when said defendant has attempted to require the successful plaintiffs to take out execution against a co-defendant, under the provisions of K.R.S. 412.110, and the plaintiffs have failed to do so within ten days thereafter?

SUMMARY STATEMENT

In addition to the facts set forth in Petitioner's Summary Statement, respondents believe the additional facts herein set forth will be helpful to the Court in determining whether the subject petition should be granted or denied.

Petitioner requested and obtained a loan of $45,888.31 from respondents. To carry out the mechanics of the transaction Teleception, Inc., co-defendant and dormant corporation of petitioner, was activated. Petitioner endorsed in blank one of the notes received from his corporation payable to his order and delivered it to respondents. Petitioner, Respondents and Teleception, Inc., entered into a written contract providing for the payment of the note in monthly installments of $1,500.00; petitioner personally bound himself to pay the note, represented his net worth to be over $350,000.00, pledged his stock in another corporation and gave powers of attorney to respondents to sell said stock in the event the note should be in default for thirty days. (Joint App., pp. 43a, 44a.)

The transfer of the assets by petitioner to Teleception, the endorsement and delivery of the note, the execution and delivery of the contract and powers of attorney were simultaneous and each the part of one transaction. (Joint App., p. 45a.)

Petitioner, directly or indirectly, paid each of the monthly installments remitted upon the note prior to default, other than the installment payable September 10, 1954, and approximately $500.00 upon another installment. An action was then instituted in the United States District Court of Kentucky and judgment obtained. At the time the action was instituted the note had not matured therein. Petitioner conceded that he was personally liable to respondents for the entire amount of the note on the maturity date but contended that he did not have to pay the installments as they accrued. The note had matured prior to the hearing of the appeal by the Court of Appeals below.

The Kentucky statute under which petitioner sought relief is K.R.S. 412.110, and is set forth at page 3 of petitioner's Petition.

REASONS FOR DENYING THE PETITION.

The matter involved herein is a local transaction involving the petitioner debtor who is trying to avoid his obligation to pay the note evidencing the debt which he owes to the respondents. A cursory examination of the Petition shows:

1. There is no federal question.

2. There is no conflicting decisions by Courts of Appeals for different circuits.

3. The Court below has not decided an important question which conflicts with applicable state law.

4. There is no important state question, the settlement of which is of importance to the public. The Court of Appeals below apparently felt that there was little moment to the issues presented by the petitioner for the Court did not write an opinion but instead merely affirmed the judgment and order appealed from in accordance with the opinion of the District Court Judge.

In view of the above, it is clear that the Petition should be denied.

As stated above the Court of Appeals has not decided a question of Kentucky law in a manner contrary to the decision of the highest court of Kentucky.

Crowdus vs. Tucker, 9 Ky. Opin. 544 (1877), is the only case in which the Court of Appeals of Kentucky has construed the phrase "his proper share" as it appears in K.R.S. 412.110. In this case Crowdus and others executed notes to the plaintiffs. The proof showed that appellant was the principal in all of a $500.00 note, except $100.00 or $115.00. Appellant was surety on the other notes. After judgment appellant notified appellee's attorney requiring him to sue out execution. He failed to do so.

After referring to the statute, the court said:

> "we are of the opinion 'his proper share' means the portion of the debt that he really owes as between himself and his co-sureties, co-obligors, co-contractors and co-defendants. . . ."
>
> "But the notice did not cover the Gartin judgment, and appellant owed as much of the five-hundred dollar claim as was adjudged against him, and therefore as to these two debts the judgment is affirmed."

The District Court, a Kentucky judge long experienced in the interpretation and application of Kentucky statutes and law, and the Court of Appeals having held that petitioner was the principal obligor in all of the debt could not grant petitioner's motion for relief unless they disregarded the interpretation of the statute as construed by the Kentucky Court of Appeals.

The District Court held that petitioner was the principal obligor because:

1. The corporate entity of Telecception, Inc., petitioner's co-defendant, was disregarded and found to be petitioner's alter ego which he was using as a shield against his responsibility for the payment of the obligations due respondents. (Joint App., pp. 33a-35a and 47a.)

2. The terms of the contract and the contemporaneous construction placed thereon by the parties showed it was the intention, understanding and agreement of the parties that petitioner was personally responsible for the payment of the monthly installments. (Joint App., pp. 31a-33a and 48a.)

Either of the foregoing reasons supports the District Court and the Court of Appeals holding that petitioner was the principal obligor. Petitioner does not even contend that the disregard of the corporate entity of the co-defendant, Telecception, Inc., is contrary to Kentucky

law. This fact alone requires a denial of the petition for writ of certiorari.

Petitioner assumes that he can have no liability with respect to the note except as an endorser. He ignores his liability under the contract and powers of attorney executed simultaneously with the note and his endorsement thereof. In Breckenridge County v. Beard, 233 Ky. 823, 27 S.W. 2d 427, the Court of Appeals of Kentucky held, in an action upon two notes, that a separate simultaneously executed contract and parol evidence as to surrounding circumstances were admissible in determining the contract between the parties, saying:

> "It is said that this action was predicated upon promissory notes alone and not upon the written agreement pursuant to which the notes were executed, and that in the absence of fraud or mistake, no evidence of contemporaneous or previous oral declarations or agreements is admissible to contradict the terms of the notes. . . . The principle of those cases cannot be applied in this one, because the basis of the notes was the written subscription, which contained in express terms the conditions upon which the notes were payable. *It is well settled that several separate writings relating to the same subject-matter must be considered together to determine the contract between the parties.* . . ."

The same rule of law is found in 7 Am. Jur., Bills and Notes, Sec. 62, pp. 820-821:

> ". . . it is well settled that a bill or note and a contemporaneous written instrument intended to control the bill or note, made between the same persons, may be read and construed together as if one in form."

In the case of Lyons v. Hager's Administrator, 278 Ky. 99, 128 S.W. 2d 196, the Kentucky Court of Appeals held that the liability of a party to a negotiable instrument may be changed by a contemporaneous written instrument notwithstanding the provisions of the Negotiable Instrument Act.

The contract between the parties was found to be ambiguous and the District Court, in conformity with the decisions of the Kentucky Court of Appeals, admitted parol evidence as an aid in the construction thereof. Whitlow v. Whitlow (Ky.) 267 S.W. 2d 739; Roberts, Master Commissioner, et al. v. Huddleston, et al. 259 Ky. 595, 82 S.W. 2d 469; Reynolds Metal Company v. Barker (Ky.), 256 S.W. 2d 17; and Thompson, et al. v. Fairleigh, et al. 300 Ky. 144, 187 S.W. 2d 812.

This case does not involve an important state question or principles, the settlement of which is of importance to the public, as distinguished from that of parties, and certiorari should be denied. Supreme Court Rule 19; Rice v. Sioux City Memorial Park Cemetery, 75 S. Ct. 614, 349 U. S. 70.

It is respectfully submitted that the petition for writ of certiorari should be denied.

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